Board of Inquiry Decision under the *Human Rights Code*, R.S.O. 1990, c. H.19

BETWEEN.

TANYS QUESNEL

Complainant

-and-

ONTARIO HUMAN RIGHTS COMMISSION

-and-

LONDON EDUCATIONAL HEALTH CENTRE

Respondent

-and-

ROBERT BRENT EIDT

Respondent

Before: Ajit John, Chair

Appearances: Anne M. Molloy and Janet Budgell for the Complainant Tanys Quesnel
Sharon Ffolkes-Abrahams for the Ontario Human Rights Commission
Brian Daly for the Respondents London Educational Health Centre and Robert Brent Eidt

Date of Decision: March 28th, 1995

Introduction

It is undisputed that the Complainant, Tanys Quesnel, is a person with a "handicap" within the meaning of section 10(1) of the *Human Rights Code*. R.S.O. 1990, c. H. 19 (the *Code*). The complaint arose when Ms. Quesnel made an appointment for chiropractic treatment at a clinic operated by the Respondent corporation, London Educational Health Centre ("LEHC") at 204 Oxford Street West, London, Ontario. The Respondent, Dr. Robert Eidt, was the owner of LEHC, at the time of the complaint. He is also the owner of the building in which the clinic is located.

The Complainant, Tanys Quesnel, has had a condition since birth known as spinal muscular atrophy, which is marked by muscle deterioration. She suffers from muscle weakness, impaired reflexes, and severely limited mobility in her arms. She uses a wheelchair at all times. When she attended at Dr. Eidt's clinic for an appointment with Dr. Pugh on July 27th, 1988, she was unable to gain access to the building as there was no ramp, lift or elevator which could accommodate her wheelchair. She went home. Later, in a telephone conversation, Dr. Eidt and Dr. Pugh offered to lift Ms. Quesnel up the stairs or, in the alternative, to provide her with a home visit. Both offers were declined by the Complainant. Dr. Eidt has also maintained in the course of the hearing that an alternative exists for Ms. Quesnel. Another chiropractor with wheelchair accessible premises in the neighbourhood has agreed to make his facilities available. Both the Complainant and the Ontario Human Rights Commission maintain that the appropriate remedy is to require Dr. Eidt to build an access ramp to the first floor of the premises at 204 Oxford Street West. They argue that allowing Dr. Eidt to rely on another chiropractor in the neighbourhood would defeat the purpose of the *Human Rights Code*. Dr. Eidt, however, takes the position that this would cause undue hardship to him.

The issues to be determined by the Board are as follows:

I. Was Ms. Quesnel subject to discrimination contrary to the *Code* when she sought chiropractic treatment at the clinic located at 204 Oxford Street?

II. If there has been discrimination, how can the Complainant be accommodated ?

III. Would the accommodation of the Complainant result in undue hardship to the Respondent?

I. PRIMA FACIE CASE FOR DISCRIMINATION

Complainant's position

The Complainant has a disability which requires her to use a wheelchair. By virtue of Section 10(1) of the *Code*, this would qualify her as a person who is "handicapped" and who is deserving of the protection of the *Code* with respect to services and facilities. When she attended for her appointment at 204 Oxford Street she found that the building was not accessible to wheelchairs. Ms. Quesnel states that she was therefore denied equal treatment in the provision of chiropractic services and that this constituted a *prima facie* infringement of section 1 of the *Code*.

> Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

She also argues that the inability to gain access to the premises at 204 Oxford Street resulted in constructive discrimination, that is to say, unintended discrimination, as set out in section 11 of the *Code*:

> A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> > (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
> >
> > (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

The lack of wheelchair accessibility, it can be argued, can be seen as a 'factor' within the meaning of s. 11(1), which resulted in the exclusion of a group of persons identified by 'handicap', a prohibited ground of discrimination.

Respondent's position

The Respondent agrees that the Complainant is a "handicapped" person for purposes of the *Code*. However, he attacks the credibility and *bona fides* of the Complainant because, it is alleged, she knew or should have known that the premises at 204 Oxford Street were inaccessible before she made the appointment in July, 1988. The Respondent maintains that Ms. Quesnel passed by the building daily during the early months of 1988 and would have known that the building was inaccessible. The Respondent also suggests that the Complainant lacks credibility because she sought chiropractic treatment without any evidence that it could benefit her. In short, the Respondent alleges that the Complainant contrived the complaint against him.

The Respondent argues, as well, that the complaint has been brought against the wrong individual and corporation. It was Dr. Pugh and not Dr. Eidt with whom the Complainant had the July, 1988 appointment. Furthermore, the Respondent states that LEHC is not in the business of providing chiropractic care. It only exists to provide space, equipment and administrative services to health care providers, including chiropractors.

The Respondent also states that the renovations to the premises, completed in 1988, were done in compliance with the applicable Building Code at that time.

Conclusions concerning the prima facie case

It was clear from the Complainant's testimony that she did not know for certain whether the building at 204 Oxford Street was accessible until she attended for her appointment. However, it is my view that the Complainant's awareness of the premises' accessibility is

not a relevant factor when considering whether or not discrimination took place. The issue of foreknowledge is not fundamental to a finding that there was discrimination or to the efforts to find an appropriate remedy.

Concerning the need for treatment, the Board heard from Dr. Herbert Lee, a distinguished expert in chiropractic. He testified that Ms. Quesnel would benefit from chiropractic treatment even though the relief would be palliative rather than curative. He recommended an initial treatment regime of six to eight weeks. I find, on the basis of this evidence, that Ms. Quesnel had a genuine reason to seek chiropractic treatment.

The Respondent sought to avoid liability by arguing that it was, in fact, Dr. Pugh who was directly responsible for the actions which resulted in discrimination. It should be noted, however, that the chiropractic service sought by Ms. Quesnel was provided through LEHC and at the premises owned and controlled by Dr. Eidt. If she was denied a right protected by the *Code*, it was because of a failure to provide access to the building. It was the Respondents who together had the power to provide this access. In any event, these hearings were not established to place blame nor to impose a penalty on any person. Rather, the *Code* requires boards and courts to seek remedies for discrimination. Accordingly, I find that the Respondents in this case are the ones who have the power to remedy the structural impediments and to provide wheelchair access to 204 Oxford Street. They are the proper Respondents in this case.

With respect to the personal Respondent's contention that he complied with local Building Codes, it is sufficient to note that section 47(2) establishes the supremacy of the *Code* over any other Act or Regulation which would allow for a contravention of Part I rights. Compliance with Building Codes does not, in itself, justify a breach of human rights legislation.

Summary of Prima Facie Case

Ms. Quesnel is a person with a handicap as defined in the *Code*. She was unable to use one of the services at LEHC because there was no wheelchair access to the premises at 204 Oxford Street. The Respondents were also responsible for the delivery of chiropractic services at 204 Oxford Street and had control over the extent and nature of access to such services. The Respondents were, therefore, responsible for a breach of Ms. Quesnel's right to equal treatment as protected by Section 1 of the *Code*.

II. DUTY TO ACCOMMODATE

Part I of the *Code* sets out what constitutes discrimination and infringement of express rights. Part II of the Code, on the other hand, outlines how one is to understand and interpret the rights set out in Part I. For example, Section 17(2) in Part II of the *Code*, describes a duty to accommodate a person with a handicap.

> The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

It goes without saying that the duty to accommodate applies whether or not the discrimination arose out of direct discrimination, adverse effect discrimination or constructive discrimination. In the case before this Board no attempt was made to show

that Dr. Eidt displayed a deliberate intention to deny Ms. Quesnel equal treatment in obtaining chiropractic services at the clinic on Oxford Street. Ms. Quesnel was denied equal access to the services at 204 Oxford Street simply because she could not manoeuvre her wheelchair beyond the front door and up an initial flight of stairs.

Counsel for the Complainant accurately described the rationale behind the requirement to accommodate people with disabilities. It is to integrate them into our society, to the greatest degree possible. What is appropriate in a given situation will vary from person to person, but the analysis must recognize that, short of undue hardship, the highest point in the continuum of accommodation must be achieved. Accommodation of persons with disabilities, therefore, ought to be consistent with principles such as normalization and full integration. This position was affirmed in *Saskatchewan Human Rights Commission and Huck v. Canadian Odeon Theatres Limited* (1985), 6 C.H.R.R. D/2682 (Sask. C.A.).

The need for accommodation and the method of accommodating protected groups requires careful examination.The Board was greatly assisted by two expert witnesses in understanding the issues surrounding access for persons with disabilities. The first was Catherine Frazee, former Chief Commissioner of the Ontario Human Rights Commission. She was qualified as an expert in the area of human rights policy. The second was Dr. Gary Woodill, a professor of applied psychology. He was qualified as an expert in the area of psychology and disabilities.

What is the proper analysis for accommodation issues? Dr. Woodill suggested that there is a difference between a "charity-based" approach to disabilities and a "rights-based" approach. In the charity-based approach, it was considered the vocation of a disabled person to beg for relief. This attitude had a long and not so glorious history. At one time there even were guilds of beggars. In more recent times, the treatment of those with disabilities

became professionalized. The CNIB was a good example of such a model in so far as it relied on motivating people to give money through special drives and appeals. Most people with disabilities find this model degrading. They do not want to be seen as objects of pity or forced to be dependent on others. A more appropriate approach suggested by Mr. Woodill, is a rights model which encourages independent living and promotes the dignity of persons with disabilities. Normalization has become the goal towards which accommodation is directed. According to Dr. Woodill, this reverses the previous trend of institutionalizing people with disabilities. Normalization seeks to bring people out of those places where they were previously hidden. As Dr. Woodill expressed it, "It really is...about persons with disabilities taking control of their own lives".

Speaking specifically about assaults on dignity, Catherine Frazee gave evidence about what a person with a disability encounters when faced with a physical or social barrier. She argued for increased exposure and increased opportunities for social interaction.

> "I think in terms of impact there are a number of things in my experience as a person with a disability, when one encounters physical barriers the first is a sense of being unwelcome. It is not necessarily understood as a conscious intent to exclude but certainly a failure to consider and to include.
>
> Another impact, of course, is to deny the person with the disability from accessing whatever is on the other side of that barrier, whether it be a service or an employment opportunity or a recreational opportunity... The person may have to go elsewhere to receive that service or to achieve that level of employment, but the options have been narrowed for that person...
>
> There are enormous barriers to those social relationships for anyone with a visible disability and ... the ones that I'm speaking [of] are, of course, the attitudinal barriers, those barriers as I said earlier, fostered to a large extent by

lack of exposure between the disabled and non-disabled population.

The only effective way that we know of to eliminate those barriers, those attitudinal barriers, is to increase exposure and to increase the opportunities for social interaction."

Who has the onus to accommodate persons with disabilities ?

Under the *Code*, the onus to make a prima facie case of discrimination rests with the complainant. Once this has been accomplished, however, the onus shifts to the respondent to show that sufficient attempts to accommodate the handicapped person have been made in accordance with section 17(2). Mr. Justice Sopinka expressed the general policy behind the principle of accommodation in *Renaud v. Central Okanagan School District No. 23, [1992] 2 S.C.R. 970 (S.C.C.)*. This was a case decided under the *Human Rights Act* of British Columbia, but it contains principles which can be applied to human rights cases in other provinces especially when the duty to accommodate is limited by concepts such as undue hardship. At page 984, Mr. Justice Sopinka wrote:

More than mere negligible effort is required to satisfy the duty to accommodate...The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship".

Has there been adequate accommodation here?

To look at the question of adequate accommodation we must use a two-stage analysis. First,

it will be necessary to examine the various ways by which the Complainant could be accommodated in order that she might gain access to the chiropractic services offered by LEHC. Secondly, it will be necessary to ask which method affords the greatest access without crossing over the line which separates undue hardship and reasonable accommodation.

The parties discussed the following means by which the Complainant could be accommodated:

1.Lifting 2. Off-site Services 3.Construction of an Elevator 4.Construction of a Wheelchair Lift 5.Construction of a ramp.

The following is an analysis of each of these forms of accommodation.

Lifting would not provide Ms. Quesnel with the degree of independence or personal dignity consistent with the *Code*. In fact, Ms. Quesnel testified that she intensely dislikes being lifted or carried because she feels that she is relying on the carrier to hold her body in the appropriate way. Dr. Woodill in his paper entitled, "The Importance of Accessibility" (1992), wrote that lifting perpetuates the image of persons with disabilities as helpless. It is also inconsistent with the principle of normalization and with the concept of integration into society. None of the parties saw this as a reasonable means of accommodation. This would qualify as the least desirable form of accommodation.

Two forms of off-site services were discussed at the hearing: home service and an alternate wheelchair accessible site elsewhere. It should be mentioned that the Respondent was of the view that his duty to accommodate was fully met since he had made an arrangement with another chiropractor, Dr. Watson, who had fully accessible premises in the neighbourhood. He argued that the arrangements had the support of the London Chiropractic Society who wished to encourage alternate off-site services in other areas. Accordingly, if any disabled person was not able to gain access, that chiropractor could arrange an appointment at the

office of a colleague who had accessible premises in the patient's own neighbourhood.

The Commission's expert had a different view. Such examples of off-site services, according to Dr. Woodill, perpetuate the segregation of persons with disabilities. They are stigmatized by being treated differently. Even if one accepts the argument that the same doctor's expertise is being provided, but at a different location, it would still be unsatisfactory because it perpetuates the stigmatization of the disabled population. The principle of accommodation was intended to reduce or even eliminate the stigmatization which accompanies a denial of access. Dr. Woodill said, "People are marked as different and they are seen both by themselves and by society as not the same as everyone else...it can be experienced as a form of oppression, being hidden away, being not allowed to come out...making comments and so on, and running into things like lack of stairs..[it] is another way of reinforcing to the person that they in fact are not treated the same as every one else." This violates the dignitary rights set out in the *Code*'s preamble. It restricts choice for persons with disabilities in ways that do not exist for others.

Dr. Woodill has referred to the adoption of a new model of consumerism as a metaphor for relations between persons with disabilities and professional care-givers. "As a consumer", writes Dr. Woodill, " a person with a disability should have the right to choose his or her services, and the service providers, and to reject those providers who do not give good service. Because disabled persons are the best judges of their own interests, they should have a larger voice in determining what services are provided in the disability services market." Restricting this choice for those with disabilities, in ways that do not exist for others, does not fulfil the *Code*'s commitment to the dignity of each person.

Similar problems exist with the off-site option of home visits. A home visit "medicalizes" the home and constitutes an invasion of privacy not just for the disabled person but for any

other person living in the same household. Historically, all the various environments in which persons with disabilities have to live and work have been medicalized and/or professionalized. According to Dr. Woodill, "For a person with a disability to protect the privacy of one's home may be seen as an attempt to keep professional services where they belong - in a professional's office or clinic... Intrusions which can be avoided ought not to be imposed." On this point, Ms. Quesnel testified that she has worked hard to separate everything that is medical from her home environment. In her words, her home is not medical. This would be undermined if she were to receive medical services in her apartment.

Construction of an elevator represents the best form of accommodation in so far as it would provide full accessibility. All parties agreed, however, that the construction of an elevator would be impractical and the cost prohibitive. A similar option for the construction of a wheelchair platform lift would provide access to the first floor only, as would the proposal for a wheelchair ramp, and the lift would cost approximately 8,000 dollars more than the ramp.

If the duty in law is to accommodate someone in a way that best meets the needs of the person and which does so in a manner most respectful of that person's autonomy and dignity, then it appears that this can be achieved through the construction of a wheelchair ramp from the parking lot to the landing on the first floor. This option was supported by the Commission's expert witness. It is true, as the Respondent's expert, Gail Lamb, pointed out, that the ramp option would not result in a fully accessible building. However, all parties agreed that access to all floors could only be achieved with an elevator and that that would be too expensive.

Objections to the ramp option.

The Respondent, through his expert, Gail Lamb, objected to the wheelchair ramp option for several reasons: first, because it would decrease the number of available parking spaces and result in a violation of a zoning by-law; secondly, because the cost would be prohibitive; thirdly, because the Respondent would lose significant revenue through the loss of one examining room.

Parking Area

One of the Commission's experts, Paul Kershaw, an architect, produced a report which revealed that at least one parking spot would be lost by constructing a ramp. The Respondents would need to obtain a variance from the Committee of Adjustments for the City of London in order to comply with zoning requirements.

There are thirteen parking spaces at present on the site and Mr. Kershaw did not think that the Committee of Adjustments would turn down an application to reduce the size of the parking area so that one spot would be lost. Two spots might be more problematic. But according to Mr. Kershaw, the calculation for required parking spaces is an arbitrary one. If the renovations for wheelchair access were calculated with the "actual area used" on the first and second floors, this would affect the formula for determining the required number of parking spaces. Much depends on whether the basement space is used in the calculation. These are very technical questions that this Board does not have the capacity to resolve.

The Respondent also raised the question of ponding, or water accumulation in the parking lot during rainstorms. Mr. Kershaw indicated that ponding would occur only in the heaviest storm or in a cloudburst.

I am satisfied that a reasonable argument can be made that the number of parking spaces

remaining after construction of a ramp might still satisfy the City. Whatever the decision of the Committee of Adjustments is, it is worth noting that the *Code,* by virtue of section 47(2), prevails over any Act or regulation which diminishes rights set out in Part I.

Examining Room

The Commission's expert, Paul Kershaw, was qualified as an expert in the barrier-free design section of the Building Code which contains specifications for washrooms, fixtures, and clearances. He confirms that these were in place in 1988 and later expanded in 1990 and 1993. The Building Code requires that there be public access to the waiting room, the washroom and the examination rooms. The Respondent's expert in architecture, Gail Lamb, testified that to allow a wheelchair into these spaces, the width of one examination room would have to be reduced from ten feet to eight feet.

Dr. Eidt said that he would not be able to provide chiropractic services in a room eight feet wide taking into account the adjustment table and the positioning of other furnishings. On hearing Gail Lamb's evidence, he went back to his office, and moved desks, chairs, adjustment tables, a doctor's stool, but according to him it was just too tight. Dr. Eidt said that the adjustment table was somewhere between two-and-one-half and three feet wide. This would leave five to five-and-one-half feet to manoeuvre.

Exiting the room was also a problem because the door swung into the room rather than out of the room. On cross examination, Dr. Eidt said that there were, in fact, two doors to the room and that this allowed the doctor to move between adjoining examination rooms without passing through the reception area. When asked if the desk could be removed, the Respondent said, " it's an important part of sitting down, talking, keeping records. Every room has one".

It is my view that the Respondent has not adequately explored options for creating more space. A smaller desk and doors that swing out instead of in are just two ways this issue could be revisited. One could say the same thing about avoiding the reception area. I am not convinced that narrowing the examination room by two feet in order to make the first floor washroom wheelchair accessible renders it unusable.

COST OF THE WHEELCHAIR RAMP

Complainant's position on the cost.

Before tackling the question of undue hardship, it would be necessary to calculate the approximate cost of this form of accommodation.

The Complainant's expert in architecture, Paul Kershaw, estimated the cost of the ramp alone to be $13,700.00 in 1989 dollars, which he said would need to be increased by 10 per cent to reach 1993 values. The cost of interior renovations would be added to this. He did admit, however, that in 1988, exclusive of any tax breaks, the cost of the interior renovations would have been thirty-three percent less than it would be in 1993.

In the end, both the Complainant and the Respondent agreed that for purposes of this hearing the cost of the ramp and the interior renovations could be fixed at $23,000.00. However, this figure does not take account of the tax deductions for the ramp, available through section 20(10)gg of the Income Tax Act, nor does it account for capital cost allowances available for the interior renovations. Together they could reduce the cost of construction by 45%. If 45% or $10,350.00 of the cost is recoverable, then the net cost of construction should be $12,650.00.

Respondent's position on cost

The Respondent asked the Board to consider the following additional factors:

(i) cost of an application to the Committee of Adjustments to allow for a variation of the Building Code requirements for parking, estimated at $5,000.00,

(ii) cost of professional snow removal to allow for wheelchair access estimated at $6,000.00.

(iii) cost of shutting down the clinic for ten days during construction estimated at $15,000.00

(iv) GST and PST on the cost of the ramp

(v) the cost occasioned by the loss of one examining room, estimated at $35,000.00/year.

(i) Cost of an application to the Committee of Adjustments.

I was satisfied that the construction of the ramp and the interior renovations, would necessitate an application to the Committee of Adjustments. Although it is impossible to fix the cost with any degree of certainty, I have included a figure of $5,000.00 in the calculation.

(ii) Snow removal costs.

The Respondent testified that during the winter months, the snow, cleared from the parking lot, is piled along the western boundary of the property. This is also where the ramp would be built. As this is a small lot, the snow would have to be removed professionally to another location. The Respondent testified that he made one inquiry and received an estimate of $6,000 per year exclusive of taxes. Assuming that a more competitive estimate could be found, I am prepared to accept the sum of $5000.00, inclusive of all taxes, as an amount to be used in calculating the net cost of the accommodation.

(iii) Shut down time.

The Respondent's expert , Gail Lamb, estimated that the interior renovations would take 10 days. The Respondent estimated that this would cost him $15,000.00 but provided no

support for this figure except to say that this represents the loss of gross billings. Alternatives to shutting down the whole clinic, such as staggered staff time or the temporary use of alternate space or weekend construction, were not seriously entertained. It is my view that these costs have not been sufficiently quantified. I am not prepared to include this item in an analysis of undue hardship.

(iv) GST and PST

The Board was not presented with any evidence on whether or not GST or PST would apply to the cost of the ramp. However, I am prepared to use the sum of $3,450.00 (being 15 per cent of construction costs) in the calculation of net cost.

(v) Loss of examination room and consequent $35,000.00 annual loss.

To allow this item we would have to accept the Respondent's contention that the narrowing of one examination room by two feet would make it unusable. He would then be forced to have one less chiropractor in the clinic with a consequent revenue loss of $35,000.00 per year. Given the possibility of using one door instead of two, having it swing out of the room, and finding a means other than a desk for taking notes and interviewing a patient, I am not convinced that the narrowing of the examination room to make way for an accessible washroom, would result in the loss of one chiropractor from the clinic. Accordingly, I have not included $35,000 per year in arriving at a cost for the proposed accommodation.

In summary, the following items will be accepted in calculating the cost of the ramp and the renovations for the purpose of determining net cost of the construction of a wheelchair ramp and interior renovations:

1.base cost as agreed upon	23,000
2.GST and PST	3,450

3.cost of snow removal	5,000	
÷.less tax adjustments of 45% on items 1&2 only	11,903	
Revised net cost		$19,547.00

III. UNDUE HARDSHIP

Burden of proof

Having decided the best form of accommodation and the approximate cost of such accommodation, it is necessary to deal with the crucial question raised by the Respondent, that is to say, the claim that the construction of a ramp would constitute undue hardship as set out in Section 17 of the *Code*. The question which must now be asked is, who has the burden of proving that the accommodation being considered would result in undue hardship? This was settled in *Simpson Sears* v. *O'Malley*, [1985] 2 S.C.R. 536 (S.C.C.). That case placed the onus on the respondent both to show that he or she has done whatever is necessary to accommodate, and to prove undue hardship.

The concept of undue hardship in cases where "handicap" is at issue, has been specifically defined in Section 17 of the *Code*. Subsection 2 requires that an undue hardship analysis can only include "cost, outside sources of funding... and health and safety requirements..."

It is also worth noting that the next subsection, 3, requires the Board to consider "any standards prescribed by the regulations for assessing what is undue hardship". At the time of these hearings, no regulations clarifying undue hardship had been passed. However, "Guidelines for Assessing the Accommodation Requirements for Persons with Disabilities" were published in 1988 by the Commission. These were meant eventually to become

regulations. But at the time of these hearings they had not been promulgated. An important question, therefore, emerged at this hearing: What weight should be given to the Guidelines? Should they just be accepted as public information produced in keeping with the function of the Commission found in section 29 of the *Code* ?

> It is the function of the Commission,
> (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act.

The law on guidelines

There has been no judicial consideration of the Commission's Guidelines to date. However, in the United States, the Supreme Court has ruled on the weight to be given to guidelines. In *Griggs v. Duke Power Co.*(1971), 401 U.S. 424 (U.S. Ct. App. - Fourth Circuit), the Equal Employment Opportunity Commission ("EEOC"), a commission similar in nature and purpose to Ontario's Human Rights Commission, issued guidelines which were used to evaluate job-related tests. Chief Justice Burger of the Supreme Court of the United States ruled that guidelines issued by an enforcing agency, for the interpretation of the governing legislation, were entitled to "great deference". He said that two characteristics should be present before guidelines receive the deference which he called for. First, they must carry forward the meaning and intent of the statute to which they refer. Secondly, they must be consistent with the legislative history of the statute. I take the latter to mean that the guidelines must be formed in a way similar to other legislative enactments and would include, for example, public consultation.

In a subsequent case, *Albermale Paper Co. v. Moody* (1974), 422 U.S. 405 , the United States Court of Appeals was asked to evaluate pre-employment tests which had a discriminatory effect. EEOC Guidelines were involved and the Court applied the *Griggs* test. The Court said (at page 431) that the EEOC Guidelines were not to be considered as administrative "regulations", normally promulgated by formal procedures established by Congress, but that they did represent the interpretation of the statute by the enforcing agency, and were entitled to great deference.

Application of the *Griggs* test

The two-pronged test for guidelines in *Griggs* are reasonable, in my view, and can be used profitably in examining the Commission's Guidelines published in Ontario. The first question which should be asked is,"Are the Guidelines consistent with *Code* values ?"

(a) Matters related to dignity

The 1988 Guidelines, along with their "commentaries", were intended to enhance the dignitary interests set out in the *Code's* preamble. There we find that it is public policy in Ontario to recognize the inherent dignity and worth of every person. Further, the purpose of the Ontario legislation is to, "create a climate of understanding and mutual respect for the dignity and worth of every person, so that each person feels a part of the community and feels able to contribute to the community". The Guidelines in question here must be measured against these concepts.

In a section entitled, "Standards for Accommodation", these sentences appear:

> The needs of persons with disabilities must be accommodated in a manner which most respects their dignity, if to do so does not create undue

hardship.

> The phrase "respects their dignity" means to act in a manner which recognizes the privacy, confidentiality, comfort, autonomy, and self-esteem of persons with disabilities, which promotes their full participation in society.

A commentary which follows this section of the Guidelines suggests that there are different ways of accommodating the needs of a person with disabilities, and more importantly, that these methods form a continuum reflecting greater or lesser respect and dignity. Dignity can also be enhanced or diminished by the timing of such accommodation. At one end would be full and immediate accommodation. At the other end would be partial, interim, phased-in, and alternate accommodation. Using this analysis, a proposal for segregated facilities, for example, would be less respectful of a person's dignity than interim or phased-in accommodation.

(b)A strict view of costs and of undue hardship.

The *Code* restricts the defence of undue hardship to the following categories: cost, outside sources of funding, and health and safety requirements. The Guidelines, in turn, stay within the *Code*'s parameters but elaborate upon their meaning. They remain true to the empowering legislation in so far as they exclude factors such as business inconvenience or business interference from the consideration of undue hardship. According to the Guidelines, unless a business 'factor' such as decreased productivity can be quantified it should not be able to qualify under "cost". Furthermore, "cost" would amount to undue hardship only if it would "alter the essential nature or substantially affect the viability of the enterprise responsible for the accommodation." The burden for accommodation is left with the service provider, and not with the complainant. This, in my view, is consistent with

the *Code*'s restrictions on cost in section 17.

A "commentary" in the Guidelines on cost, recommends that items should be quantifiable, not speculative or impressionistic. They must also be "related" to the accommodation in question and should only include the following items: capital and operating costs; costs of additional staff time where restructuring is not possible; and any other quantifiable and demonstrably related costs. Reliance on objective evidence such as full financial statements, budgets, and scientific data resulting from empirical studies, are in keeping with the *Code*'s strict view of costs in the determination of undue hardship.

Finally, with respect to "cost", the Guidelines require that the defence of undue hardship only be accepted if the cost of accommodation would alter the essential nature or substantially affect the viability of the respondent's enterprise. Again, this elaborates upon the rigorous test already present in the *Code*.

(c) Onus on the service provider to accommodate the complainant.

Once again, on the issue of onus, the Guidelines are consistent with the *Code*'s purposes. They reverse the pre-existing trend which placed the financial burden of access and accommodation on the person with the disability. In the words of the commentary under this section:

> The person responsible for accommodation would need to show how [the business] would be altered or its viability affected. It will not be acceptable for the person responsible for accommodation to merely state, without evidence to support the statement, that the company operates on low margins and would go out of business if required to undertake the required accommodation.

The burden of demonstrating undue hardship remains with the Respondent.

The second prong of the *Griggs* test raises the following question, "Were the Guidelines drafted in a way that is consistent with the legislative history of the empowering statute itself?"

Catherine Frazee who was a Commissioner at the Human Rights Commission in 1988, told the Board that she was asked to participate on an internal working committee to prepare draft guidelines. The draft was approved by the Commission late in 1988 and a process of external consultation was begun almost immediately. Various interest groups and organisations in the disability community, and in the public and private sector were contacted with a view to incorporating changes to the draft. The final draft was approved by the Commission in September, 1989. It was expected that the government would adopt the Guidelines as regulations at some later date.

The Commission felt it was under an obligation to inform the public about how it would be interpreting the *Code* and to clarify the concepts of "accommodation" and "undue hardship". Accordingly, the Commission published what is officially titled, "Guidelines for Assessing the Accommodation Requirements for Persons with Disabilities". In my view the development of the Guidelenes was consistent with the legislative history of the *Code* itself.

Respondent's position against acceptance of the Guidelines.

The Respondent argued that this Board should not give much weight to the Guidelines, as they represented only the interpretation of material words in the statute by one party to these proceedings, namely the Ontario Human Rights Commission. According to the

Respondent, they fell short of the standards set in *O'Malley* where the Supreme Court of Canada held that reasonable measures or standards were questions of fact and would vary with the circumstances. Mr. Justice McIntyre, however, placed these comments within a context which was not acknowledged by the Respondent:

> Legislation of this type is of a special nature, not quite constitutional but certainly more than ordinary - and it is for the courts to seek out its purpose and give it effect. The *Code* aims at the removal of discrimination... Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result of the effect of the action complained of which is significant.

In general, absent any specific definition of undue hardship such as section 17, the cases provide a list of factors which attempt to uphold the purpose of accommodation. In the *Renaud* case, *supra*, which involved accommodation in employment, Sopinka, J. said that the term "undue hardship" implies that some degree of hardship is acceptable. He suggested that the limit should be reasonable and referred to a list provided by Wilson, J. in *Central Alberta Dairy Pool* (1990), 72 D.L.R.(4th) 417 (S.C.C.). The list attempts to set out factors that might impinge on the operation of the respondent's business. It included financial cost, disruption of the collective agreement, morale of employees, interchangeability of work force and facilities, and safety concerns. Wilson, J. said that the list was not intended to be exhaustive and that the factors must be balanced against the right of the complainant to free from discrimination. I mention these views of undue hardship to indicate that the general thrust of human rights legislation in preserving dignity and enhancing equality rights must be maintained.

The overwhelming factor in the undue hardship analysis in the case before this Board is the fact that the judicial comments on the issue in cases of handicap access are now statutorily enshrined. The general definition of undue hardship discussed in the cases above has been clarified and qualified by the specific wording of section 17. As I mentioned earlier, the Legislature of Ontario has specifically rejected notions of mere business interference. In addition, we have the Guidelines on Accommodation which further define "undue hardship" in ways that enhance the purpose of the *Code* and should be afforded great deference. The Guidelines further narrow or qualify the definition of undue hardship.

The Respondent argued that the assessment of undue hardship should not be restricted to cost alone. He asked the Board to reject the test of business viability contained in the Guidelines and to use the test of "practicality" mentioned in *Zurich Insurance Company v. Ontario Human Rights Comission et al.* (1992), 93 D.L.R. (4th) 346 (S.C.C.). That case, however, dealt with insurance policies and with the interpretation of a different section 22 of the Code. No reference to reasonable standards exist in this section, nor does it have anything to say about the limits to the undue hardship test.

It was the Respondent's position throughout that the Board should adopt a broader meaning to the phrase "undue hardship". However, it is clear from the *O'Malley* decision that if a more flexible construction is to be used, it must be in keeping with the general purposes of human rights legislation. Concerning human rights statutes such as the *Code*, McIntyre, J. had this to say in *O'Malley* (at page 328):

> It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the *Code* than the narrowest interpretation of the words employed....Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect. The

Code aims at the removal of discrimination.

However, when dealing with section 17 of the *Code*, the problem takes on significant differences. Would, for example, the broadening of the definition of undue hardship so as to include business interference or impracticality advance the broad purposes of the *Code*? The answer must be in the negative because it would not advance the purposes of the *Code* to expand the reasons for the Respondent to escape the requirement to accommodate. In other words, it proscribes what the Respondent can say in explaining why he should not be called upon to accommodate the Complainant. It follows, then, that the stricter the interpretation of section 17, the greater the chance of relief for victims of discrimination until the limit of undue hardship is reached. I cannot accept the call for an expansion of the categories in the undue hardship analysis.

Net Worth and Viability

Once the cost of the appropriate form of accommodation has been fixed, the next step in the analysis of undue hardship after a calculation of construction costs is to consider whether the Respondent can finance it. Does Dr. Eidt have sufficient cash flow? Is he able to borrow? Are there outside sources of funding? The last option can be easily dismissed since both Complainant and Respondent agreed that no outside sources of funding were available.

The Guidelines set out the standard for assessing undue hardship by asking this question: "Would the cost of accommodation alter the essential nature or would it substantially affect the viability of the enterprise responsible for the accommodation?"
Some of the relevant considerations are as follows:

(I) the ability of the person responsible for accommodation to recover the

costs of accommodation in the normal course of business;

(II) the availability of any grants, subsidies or loans from the federal, provincial or municipal government or from non-government sources which could offset the costs of accommodation;

(III) the ability of the person responsible for accommodation to distribute the costs of accommodation throughout the whole operation;

(IV) the ability of the person responsible for the accommodation to amortize or depreciate capital costs associated with the accommodation according to generally accepted accounting principles;

(V) the ability of the person responsible for accommodation to deduct from the costs of accommodation any savings that may be available as a result of the accommodation, including:

(i) tax deductions and other government benefits;

(ii) an improvement in productivity, efficiency or effectiveness;

(iii) any increase in the resale value of property, where it is reasonably foreseeable that the property might be sold;

(iv) any increase in clientele, potential labour pool, or tenants.

The Guidelines suggest that the person responsible for accommodation would be required to establish that the costs which remain after steps are taken to recover costs will alter the essential viability of the enterprise. It would not be acceptable, if the Guidelines are to be followed, for the person responsible for accommodation to merely state, without evidence to support the statement, that the company operates on low margins and would go out of business if required to undertake the required accommodation.

The Respondent retained an expert in accounting, Michael A. Bondy, to prepare a report on the net worth of Dr. Eidt. The Commission retained its own expert, Cameron A. McCaw, to

Dr. Eidt was also expected to enjoy a substantial reduction in mortgage payments in 1993 and 1994. This would substantially increase his cash flow. The first mortgage on 204 Oxford Street at 12%, was due to mature by October 15th, 1993. Based on a renewal rate of 8.75%, and allowing for adjustments in income tax, payments on the first mortgage would be reduced by $4,300. For the second mortgage the net reduction would be $1,500. The total annual savings in mortgage payments alone would be $5,800.00 per year.

Finally, both Bondy and McCaw agreed that the expenses for the practice could be trimmed somewhat. The 1992 financial statements revealed that in the area of promotion and development, almost $8,000 was not related to advertising and was probably a personal or family expense. In this regard, it is worth noting that Mr. McCaw criticized Mr. Bondy's net worth statement because it did not account for the fact that Dr. Eidt's indebtedness was not limited to the practice at 204 Oxford Street, but included personal indebtedness. Accumulated debt of a personal nature should not be brought into the evaluation of the viability of the practice.

Mr.McCaw's Report contains an analysis of the viability of Dr. Eidt's practice which I have accepted for the purpose of determining whether or not the net cost of making 204 Oxford Street accessible constitutes undue hardship. He looked at the following categories: net income, or cash flow; family, or global income; goodwill; personal assets; net equity in the property; debt capacity; and future obligations. His comments on viability were succinct. The business was profitable but it was negatively affected by excessive draws by Dr. Eidt for things which may have been of a personal nature. His view based on the financial statements was that the business was profitable and that it was generating revenues in excess of expenses.

critique Bondy's report and to provide a separate analysis of Dr. Eidt's financial status.

The reports of the accountants

Mr. Bondy produced a report in which he concluded that Dr. Eidt was not capable of servicing any further debt. To support any substantial increase in debt, Mr. Bondy estimated that Dr. Eidt would need an annual income of approximately $91,000.00. The financial statements revealed that Dr. Eidt's net professional income varied from $61,438.10 to $73,640.00. Mr. Bondy, nevertheless, admitted on cross-examination, that Dr. Eidt's practice income had increased each year since 1987 at a little under 5% per year. He also admitted that Dr. Eidt has $85,000.00 equity in his home and $30,000.00 in the property at 204 Oxford Street. This would provide for a net equity of $115,000.00 against which to borrow $20,000.00 to make the premises accessible.

The evidence of the accountants gave rise to a further question. Would it be possible for Dr. Eidt to borrow on the strength of the future income of his practice? There was enough evidence to suggest that Dr. Eidt was expanding his credit limits in clear expectation that his income would rise with each succeeding year. It did.

The prospect of Dr. Eidt's business expanding is a reasonable one. The evidence gathered in Mr. McCaw's report showed a steady growth in billings from $141,246 in 1988 to $230,936 in 1992. Cash flow from the business was sufficient to fund the ramp and the renovations. Although he did not have the income tax return for the year 1992, Mr. McCaw estimated, on the information available, that the practice income for 1992 had increased by 25%.

Mr. McCaw also suggested that as the business grew, there would be a greater ability among the practitioners in the clinic to share expenses of construction and renovation. Costs were already being shared by the other doctors.

In summary, I accept Mr. McCaw's unequivocal conclusion that Dr. Eidt is able to fund a wheelchair access modification to 204 Oxford Street. Based on that conclusion, I find that construction of the ramp would not affect the viability of the enterprise. The Respondent has not been able to prove on a balance of probabilities, that such an accommodation would constitute undue hardship as defined in Section 17.

ORDER

The Respondents, Robert Brent Eidt and London Educational Health Centre are jointly and severally liable.

1. The Respondents shall pay to the Complainant the sum of $500.00 in damages for the infringement of her rights.

2. The Respondents shall take immediate steps to provide wheelchair access by ramp to the first floor of the building at 204 Oxford Street, in the City of London, Ontario.

3. The Respondents shall use their best efforts to obtain whatever approvals or variances may be required by municipal or other authorities in respect of such renovations.

4. The Respondents shall serve the Commission and the Complainant with notice of any application for approvals or variances referred to in paragraph 3 above.

The Board of Inquiry shall remain seized of this matter in the event that issues arise concerning the implementation of this Order.